Samundee Devan a/l Muthu Kerishnan v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–82 OF 2008(B)
ZAKI AZMI CHIEF JUSTICE, HASHIM YUSOFF AND MOHD GHAZALI FCJJ
17 JUNE 2009

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Prosecution proved mens rea possession without resorting to presumption of possession at close of prosecution — Whether court entitled to apply presumption of trafficking at close of prosecution — Whether defence of denial rebutted presumption of trafficking — Whether court ought to convict accused for trafficking

Criminal Procedure — Charge — Amendment — Prosecution established prima facie case on two charges of trafficking — Trial judge amended both charges to lesser and single count of possession — Whether amendment proper — Whether trial judge misdirected himself

Evidence — Circumstantial evidence — Inferences from facts — Whether sufficient facts to support inference of possession and knowledge of dangerous drugs

Acting on information in relation to a stolen motorcar, the police found the motorcar and made an observation from a distance. They saw the appellant opening the boot of the said motorcar and taking out a red plastic package. When the police identified themselves to the appellant, he looked shocked and pale and attempted to run away but was apprehended. Dangerous drugs were found in the package. The appellant was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The learned trial judge was satisfied that the appellant was in possession of the dangerous drugs and invoked the presumption of trafficking under s 37(da)(iiia) of the Act. At the close of the case for the defence the learned trial judge concluded that the defence was one of mere denial. However, after hearing the submissions of both sides, the learned trial judge amended the two charges of trafficking and substituted therewith to one of possession under s 12(2) of the Act. The Court of Appeal allowed the appeal by the public prosecutor and set aside the whole decision of the learned trial judge, substituting it with a conviction under s 39B(1)(a) of the Act in respect of both the original charges of trafficking. The Court of Appeal accordingly imposed the mandatory death sentence on the appellant under

each of the original charges of trafficking. Hence this appeal by the appellant wherein he argued that there was no mens rea of trafficking.

Held, dismissing the appeal:

(1) The contemporaneous conduct of the appellant in attempting to run away when the police identified themselves was relevant and admissible pursuant to s 8 of the Evidence Act 1950. Such conduct was to be taken not in isolation but together with all the other circumstances of the case (see para 15).

(2) The appellant was clearly in possession of the plastic packages and had knowledge of the contents. The facts denoted that the said dangerous drugs were in his custody and control. He was in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. He was clearly aware of the packages and was holding one of the packages when he was approached by the police. These facts and circumstances gave rise to a strong inference that the appellant had mens rea of possession of the packages and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s 37(d) of the Act (see para 17).

(3) The dangerous drugs were in excess of 15gm respectively as provided under s 37(da)(iiia) of the Act and this triggered the statutory presumption of trafficking in s 37(da) of the Act. The Court of Appeal had rightly set aside the trial judge's decision and substituted it with a conviction under s 39B(1)(a) of the Act in respect of the original charges of trafficking as the appellant failed to cast a reasonable doubt (see paras 18–19).

[Bahasa Malaysia summary

Bertindak atas maklumat berkaitan dengan kereta yang dicuri, polis menjumpai kereta tersebut dan membuat pengawasan dari jauh. Mereka melihat perayu membuka but kereta tersebut dan mengeluarkan satu bungkusan plastik berwarna merah. Apabila polis mengenalkan diri mereka kepada perayu, dia kelihatan terperanjat dan pucat dan cuba melarikan diri tetapi diberkas. Dadah berbahaya telah ditemui dalam bungkusan itu. Perayu didakwa atas dua kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Hakim perbicaraan yang bijaksana berpuas hati bahawa perayu mempunyai milikan dadah berbahaya dan menggunakan anggapan pengedaran di bawah s 37(da)(iiia) Akta tersebut. Di akhir kes pembelaan hakim perbicaraan yang bijaksana memutuskan bahawa pembelaan adalah satu penafian semata-mata. Walau bagaimanapun, selepas mendengar penghujahan kedua-dua pihak, hakim perbicaraan yang bijaksana meminda dua tuduhan pengedaran dan menggantikannya dengan satu tuduhan milikan di bawah s 12(2) Akta

tersebut. Mahkamah Rayuan membenarkan rayuan oleh pendakwa raya dan mengetepikan keseluruhan keputusan hakim perbicaraan yang bijaksana, menggantikan ia dengan sabitan di bawah s 39B(1)(a) Akta tersebut terhadap kedua-dua pertuduhan pengedaran asal. Mahkamah Rayuan mengenakan hukuman mati mandatori ke atas setiap satu tuduhan pengedaran asal. Maka rayuan ini oleh perayu di mana dia menghujahkan bahawa tidak ada mens rea pengedaran dalam kes ini.

Diputuskan, menolak rayuan tersebut:

(1) Tindakan perayu cuba untuk melarikan diri apabila polis mengenalkan diri mereka adalah relevan dan boleh diterima menurut s 8 Akta Keterangan 1950. Kelakuan sedemikan tidak boleh diambil kira dengan sendirinya tetapi bersama-sama dengan kesemua keadaan lain kes (lihat perenggan 15).

(2) Adalah jelas perayu memiliki bungkusan-bungkusan plastik tersebut dan mempunyai pengetahuan mengenai kandungannya. Fakta-fakta itu bererti bahawa dadah berbahaya berada dalam jagaan dan kawalannya. Dia memiliki satu set kunci yang mana salah satu daripadanya digunakan untuk membuka but kereta di mana dadah berbahaya itu dijumpai. Dia jelas sedar mengenai bungkusan-bungkusan itu dan sedang memegang satu daripadanya apabila dia dihampiri oleh polis. Fakta-fakta dan keadaan-keadaan ini memberi satu inferens kukuh bahawa perayu mempunyai mens rea milikan bungkusan-bungkusan itu dan dia mempunyai pengetahuan mengenai dadah berbahaya tersebut. Terdapat bukti milikan dadah berbahaya yang tidak terikat kepada s 37(d) Akta tersebut (lihat perenggan 17).

(3) Dadah berbahaya tersebut masing-masing adalah lebih daripada 15 gram sebagaimana diperuntukkan di bawah s 37(da)(iiia) Akta tersebut dan ini mencetuskan anggapan berkanun pengedaran dalam s 37(da) Akta tersebut. Mahkamah Rayuan dengan betul mengetepikan keputusan hakim perbicaraan itu dan menggantikannya dengan satu sabitan di bawah s 39B(1)(a) Akta tersebut terhadap pertuduhan-pertuduhan pengedaran asal kerana perayu gagal menimbulkan keraguan munasabah (lihat perenggan 18–19).]

Notes

For cases on amendment, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1060–1065.

For cases on inferences from facts, see 7(2) *Mallal's Digest*(4th Ed, 2006 Reissue) paras 629–631.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11, SC (refd)
Samundee Devan a/l Kerishnan Muthu v PP [2009] 1 MLJ 697, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da)(iiia), 39(A)(1), 39B(1)(a), 39B(2)
Evidence Act 1950 s 8

Appeal from: Criminal Appeal Nos B-05–39 of 2005 and B-05–40 of 2005 (Court of Appeal, Putrajaya)

Karpal Singh (Karpal Singh & Co) for the appellant.
Nurulhuda Nur'aini Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali FCJ (delivering judgment of the court):

[1] The appellant was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same. The first charge relates to 33.2g of heroin and monoacetylmorphines (5.8g of heroin and 27.4g of monoacetylmorphines) and the second charge relates to 514.1g of heroin and monoacetylmorphines (73.6g of heroin and 440.5g of monoacetylmorphines).

[2] The facts showed that on 2 April 1999 at 7.40am, acting on information in relation to a stolen motorcar, L/Kpl Chandran ('PW7') and L/Kpl Appasamy from the Criminal Intelligence Unit, Police Headquarters, Petaling Jaya went to the car park of Flat C, Taman Petaling Utama, Petaling Jaya to investigate. Having identified the stolen motorcar and having noted that there was no one in the motorcar, they made an observation from a distance for about an hour and 40 minutes. Subsequently, they saw the appellant walking towards the motorcar. The appellant then stopped, looked around, opened the boot of the motorcar and took out a red plastic package and then closed the boot. PW7 together with L/Kpl Appasamy immediately rushed towards the appellant and PW7 identified himself as 'police'. The appellant looked shocked and pale and attempted to run away but was apprehended. PW7 seized the red plastic package from the appellant's hand and upon opening the package, found therein 140 small plastic packets each containing pinkish crystallite and powdery substance later analysed by the

chemist to be heroin monoacetylmorphines. Upon searching the boot of the motorcar, they found four plastic packages and therein 1,648 small plastic packets which also contained a similar pink crystallite and powdery substance also later analysed by the chemist to be heroin monoacetylmorphines.

[3] When the case for the prosecution was concluded, the learned trial judge of the High Court found that a prima facie case had been made out against the appellant on both charges of trafficking and hence called upon the appellant to enter on his defence. He was satisfied that the appellant was in possession of the dangerous drugs and accordingly invoked the presumption of trafficking under s 37(da)(iiia) of the Act.

[4] The appellant elected to make a statement from the dock. He also called two witnesses, namely, his mother ('DW1') and sister ('DW2').

[5] At the close of the case for the defence the learned trial judge concluded that the defence was one of mere denial. He also found the evidence of DW1 and DW2 to be irrelevant as they were not present at the time of the arrest and nor did they know anything about the motorcar or the packages containing the dangerous drugs seized from the appellant by the police.

[6] However, at the conclusion of the trial and after hearing the submission of both the deputy public prosecutor and counsel for the appellant, the learned trial judge amended the two charges of trafficking and substituted therewith to one of possession of 4.875g of heroin and monoacetylmorphines under s 12(2) of the Act punishable under s 39A(1) of the same and sentenced the appellant to five years imprisonment and nine strokes of whipping.

[7] The learned trial judge made the decision that he did after concluding that the analysis carried out by the chemist ('PW6') based on the small quantities of samples for the purpose of quantitative test was not sufficient, ie, he was dissatisfied with the small weight of the samples used by the chemist for analysis. In relation to this, the learned trial judge said in his grounds of judgment that he relied on *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 as a basis for his conclusion. In *Leong Bon Huat*, a conviction under s 39B(1)(a) of the Act for trafficking in 793.85g of cannabis was attacked on appeal on the ground that the testimony of the chemist did not prove beyond reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s 2 of the Act. In that case, the chemist testified 'I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g'. In delivering the judgment of this court, Edgar Joseph Jr SCJ said (at pp 14–15):

> What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.
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> To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% — and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning — then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s 37(da) of the Act.
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> Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute in lieu thereof, a conviction for possession of cannabis in contravention of s 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

[8] On appeal by both the appellant and the public prosecutor in the instant appeal, the Court of Appeal allowed the appeal by the public prosecutor, set aside the whole decision of the learned trial judge and substituted it with a conviction under s 39B(1)(a) of the Act and punishable under s 39B(2) of the same in respect of both the original charges of trafficking. The Court of Appeal accordingly imposed the mandatory death sentence on the appellant under each of the original charges of trafficking.

[9] The appellant appealed to this court.

[10] In the judgment of the Court of Appeal in the instant appeal (since reported as *Samundee Devan a/l Kerishnan Muthu v Public Prosecutor* [2009] 1 MLJ 697), the court referred to its judgment in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 where it was decided that *Leong Bon Huat* did not lay down any general principle. In delivering the judgment of the court in *Gunalan*, Abdul Hamid Mohamad JCA (as he then was) said (at p 516):

> With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v Lam San* [1991] 3 MLJ 426. With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v Lam San* [1991] 3 MLJ 426, the 10% is nothing more that the practice among chemists.

The views of the learned judge above was accepted by this court in *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201.

[11] In its judgment in the instant appeal, the Court of Appeal was of the view that the decision of the learned trial judge to amend both charges from trafficking in the dangerous drugs to one single charge of possession of the dangerous drugs was flawed.

[12] Before us, learned counsel for the appellant conceded that he has to accept the evidence of the chemist and hence did not pursue the above issue. He only raised one point, namely, whether there was mens rea trafficking. He pointed out that the dangerous drugs were found in plastic bags and this showed that there was no mens rea trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under s 37(da)(iiia) of the Act at the conclusion of the case for the prosecution. Counsel then attacked the judgment of the Court of Appeal on the ground that the judgment seems to revolve around the conduct of the appellant. In relation to this, he referred to pp 705–706 of the judgment of the Court of Appeal (as reported in the Malayan Law Journal) where Abdul Malik Ishak JCA, in delivering the judgment of the court, dealt with the conduct of the appellant just before he was arrested as follows:

(a) 'the first conduct' — when the appellant stopped at the motorcar, he was seen 'looking to the left, to the right and to the front and at the same time turning his head to the left and to the right';

(b) 'the second conduct' — when PW7 and L/Kpl Appasamy rushed to the appellant and PW7 introduced himself as 'police', the appellant 'looked shocked and attempted to run away'; and

(c) 'the third conduct' — because of the squeaky noise made by the shoes worn by PW7 and L/Kpl Appasamy, the appellant saw PW7 and 'looked surprised and his face turned pale'.

[13] We cannot see any merits in this argument. The learned judge was merely laying the factual matrix at the close of the prosecution's case based on the evidence adduced which also included the following:

(a) that before the appellant opened the boot of the motorcar he was 'behaving suspiciously';

(b) that the appellant had a set of keys and had used one of the keys to open the boot of the motorcar;

(c) that the appellant then took out a red plastic package inclusive of its contents and held it in his right hand and was seen walking away from the motorcar;

(d) that when PW7 and L/Kpl Appasamy rushed toward the appellant and PW7 introduced himself as 'police', the appellant attempted to run

away with the red plastic bag but was apprehended 'and he behaved as per the second conduct and as per the third conduct'; and

(e) that when the appellant was asked to open the boot of the motorcar by the police, PW7 discovered four more plastic packages which contained the subject matter of the second charge.

[14] Consequent to laying down the factual matrix discussed above, the learned judge of the Court of Appeal said:

> Those were the facts and the circumstances of the case as adduced by the prosecution. We merely reproduce them without any addition or subtraction. Our approach is in accord with the decision of this court in *Basil bin Omar v Public Prosecutor* [2003] 1 MLJ 192. Each of the conduct of the accused when taken separately may appear neutral but when taken together they gave rise to the inference that the accused was aware of the contents of the red plastic package that he was carrying in his right hand as well as the drugs that were found in the boot of the blue Honda Civic. We must not forget that when PW7 and his colleague went to the car park of Flat 'C', it was entirely based on the information pertaining to the theft of a stolen motor vehicle. No information was received in regard to a drug related offence. Both PW7 and his colleague must have least expected to arrest the accused for being in physical possession of the drugs. We are entitled to take into account the damning conduct of the accused before he was arrested.

[15] We are also of the view that the contemporaneous conduct of the appellant in attempting to run away when PW7 identified himself as 'police' is relevant and admissible pursuant to s 8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct is of course not to be taken in isolation but together with all the other circumstances of the case. That would be the correct approach to circumstantial evidence (see *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307).

[16] We also find no merits in the argument canvassed by learned counsel for the appellant that since the dangerous drugs were found in plastic bags, this showed that there was no mens rea trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under s 37(da)(iiia) of the Act at the conclusion of the case for the prosecution.

[17] We find that the evidence adduced by the prosecution before the learned trial judge showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of the contents of the packages. The facts denote that the said dangerous drugs were in his custody and control. He was in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. He was clearly aware of the packages and was in fact holding one of the packages when he was approached by the police and consequently attempted to run

away. The combined strength of these facts and circumstances gave rise to a strong inference that the appellant had mens rea possession of the packages containing the dangerous drugs and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s 37(d) of the Act.

[18] The dangerous drugs as per the two charges were in excess of 15g respectively as provided under s 37(da)(iiia) of the Act and this would trigger the statutory presumption of trafficking as provided in s 37(da) of the Act. Premised upon these facts, the learned trial judge was correct in finding that a prima facie case has been made out against the appellant at the conclusion of the case for the prosecution on the two offences that he was charged with and calling upon him to enter on his defence. The learned trial judge found that the defence was a mere denial.

[19] The Court of Appeal found that the learned trial judge had erred in arriving at the whole of the decision and as a consequence had set aside his whole decision and substituted it with a conviction under s 39B(1)(a) of the Act and punishable under s 39B(2) of the same in respect of both of the original charges of trafficking and rightly so as the appellant failed to cast a reasonable doubt.

[20] As we find no plausible reason to disturb the decision of the Court of Appeal, this appeal is hereby dismissed. Conviction and sentence imposed on both charges are affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum